98.

July 27. 1758 Mark settled by the Court of Session

5 Dec. 1760

INFORMATION for *Agnes Stewart* of *Phiſgill*, and *John Hathorn* her Huſband, Purſuer;

Againſt the Children of Capt. *John Stewart* of *Drummorrall*, and others, Defenders.

THE ſingle Point now at Iſſue between the above-named Parties, and which the Lord *Auchinleck* Ordinary is to report, is the Purſuer's Claim of Relief againſt the Eſtate of *Drummorrall*, of the Annuity or Liferent-infeftment, to the Extent of *L.* 50 *Sterling* yearly, which *John Coltrain* of *Drummorral* granted upon the Eſtate of *Phiſgill* in favour of Mrs *Chriſtian Herron* his Spouſe; and which, by the Judgments to be hereafter mentioned, has been ſuſtained as an effectual Incumbrance upon ſaid Eſtate, in favour of the ſaid Mrs *Chriſtian Herron*, as a ſuppoſed *bona fide* onerous Purchaſer: And the Facts which give Riſe to the Queſtion are as follows.

By Marriage-articles, of this Date, between *John Stewart* of *Phiſgill*, and *Agnes Stewart*, Daughter and Heireſs of *Thomas Stewart* Provoſt of *Wigton*, the ſaid *Agnes* diſponed her Lands and Eſtate of *Glenturk*, *&c.* to the ſaid *John Stewart*, and the Heirs of the Marriage; Remainder to the Heirs-male of *John Stewart*'s Body of any other Marriage; Remainder to herſelf, and her own Heirs whatſoever. And the ſaid *John Stewart*, on the other Part, became thereby bound and obliged to provide and ſecure what Lands, Heritages, Goods, Gear, *&c.* he ſhould happen to conqueſs and acquire during the ſtanding of the Marriage, to the Heirs to be procreated thereof. And upon the Precept of Seiſin contained in the ſaid *Agnes Stewart*'s Diſpoſition, *John Stewart* the Huſband was infeft in her proper Lands, and his Infeftment duly recorded in the general Regiſter of Seiſins. 1668.

Of this Marriage there were Iſſue four Sons and four Daughters. *David*, the eldeſt Son, predeceaſed his Father, unmarried,

married, and without Iſſue. *Robert*, the ſecond Son, likewiſe died during the Life of his Father; and left Iſſue one only Daughter, the now Purſuer, an Infant at the Time; who thus, in the Right of her Father *Robert*, became the undoubted Heir of the aforeſaid Marriage; and as ſuch, upon the Death of her Grandfather *John Stewart*, became intitled to the Succeſſion of both Eſtates, which, by the aforeſaid Marriage-articles, were limited to the Heir of that Marriage.

It appears, that, upon the Death of *Robert* the ſecond Son, a Scheme was early conceived, of fruſtrating his Infant-daughter of her Right of Succeſſion to ſaid Eſtates, and of ſettling the ſame upon the other Iſſue, male and female, deſcended of the Body of the ſaid *John Stewart*. There had been two Duplicates of the aforeſaid Marriage-contract, duly ſubſcribed by the Parties themſelves, and by Numbers of the Lady's Friends of the firſt Rank and Figure in that Country. But as that Duplicate which had been left with the Bride's Friends, had been neglected to be filled up in the Blank which had been left for the Witneſſes Names and Deſignations, which therefore was not in Law probative; if the other Duplicate could be withdrawn or concealed, it would pave the Way for that Settlement which *John Stewart* was then meditating to the Excluſion of his Infant-grandchild, the Daughter of *Robert*.

To prevent any undue Advantage of this kind, *Robert*'s Wi-
1716. dow, of this Date, brought an Action before this Court, in name of her Infant-daughter, for Exhibition and Delivery of the aforeſaid Marriage-articles. To which Suit, *John Stewart* himſelf, *William* his third Son, then become the eldeſt, by the Death of his two elder Brothers, and *John Coltrain* of *Drummorrall*, Grandſon to the ſaid *John Stewart* by *Eliſabeth* his ſecond Daughter, were made Parties, as the Perſons in one or other of whoſe Hands the aforeſaid Marriage-articles were ſuppoſed to be; and as ſundry Proceedings were taken in ſaid Proceſs, in order to force Exhibition and Diſcovery of the aforeſaid Marriage-contract, *John Coltrain* of *Drummorrall*, who was a Party to

to ſaid Proceſs, could not be ignorant of the Infant's Claim, as founded upon that Marriage-contract.

During the Pendency of ſaid Proceſs, *Robert*'s Widow, a Native of *England*, had Occaſion to go to *London*, to pay a Viſit to her Relations there, and carrying her Infant-daughter alongſt with her, ſickened and died, which put an End to the aforeſaid Suit; as none remained, but the Relations on the Father's Side, to look after the Concerns of this Infant; and as their Intereſts came thereby to interfere, it cannot be Matter of Surpriſe, that her Concerns were neglected.

John Stewart, who by this Time was become extremely old and infirm, was, of this Date, prevailed upon to execute a Deed of Settlement, comprehending both his own and his Wife's Eſtates, in the Form of a ſtrict Entail; whereby he limited the ſame to the Heirs-male of his own Body; Remainder to the Heirs-female of his Body, and the Heirs-male of their Bodies, the eldeſt Heir-female ſucceeding without Diviſion; Remainder to ſuch Perſons as he ſhould name, even *in lecto ægritudinis*; Remainder to his Heirs-male whatſoever; Remainder to his Heirs and Aſſignees whatſoever: But with an expreſs Exheredation of his Infant-grandchild, the Daughter of *Robert*, in the following Words, "Secluding and debarring always the Daughter of the deceaſed *Robert Stewart*, my lawful Son, from "ſucceeding to ſaid Lands and Eſtate, or any Part thereof, in "all Time coming." 1719.

But it is material to obſerve, that though the Purſuer *Agnes*, the Infant-daughter of *Robert*, was thus *nominatim* diſinherited of her Right of Succeſſion, to which ſhe was undeniably intitled by the aforeſaid Marriage-contract, the Iſſue of her Body were not diſinherited; and therefore were intitled, upon their Exiſtence, to the Succeſſion, as Heirs-female deſcended of *John Stewart*'s Body, preferable to his immediate Daughters, or their Iſſue; and, agreeably to your Lordſhips Judgment, in the late Queſtion touching the Eſtate of *Mackinnon*, could have obliged the remoter Heir, who had ſucceeded to the Eſtate before their Exiſtence, to have denuded of ſaid Eſtate in their favour;

favour; and to have purged the ſame of all Incumbrances impoſed upon the ſame, and that even in terms of the new Settlement contained in the Tailzie 1719.

This Entail 1719 was recorded in the Regiſter of Tailzies, a Charter under the Great Seal thereupon expede, and Livery of Seiſin taken thereon.

1720. Upon the Death of *John Stewart*, Capt. *William*, his third Son, then become eldeſt, by the Death of his two elder Brothers without Iſſue-male, obtained himſelf ſerved Heir of Tailzie to his Father in ſaid Eſtate; and was thereon infeft.

In the Year 1721, Capt. *William Stewart* went to *London*, and, under Pretence of Friendſhip to his Infant-niece, got her into his Poſſeſſion, and ſent her down to *Scotland*, where ſhe remained under his Cuſtody and Tuition ſo long as he lived. And, in the Year 1725, he took up from *John Binning* Writer in *Edinburgh*, who had been employed as Agent therein, the above-mentioned Proceſs of Exhibition and Delivery of the Marriage-contract 1668, which had been raiſed in Name of the ſaid Infant, by her Mother, with the principal Minutes and Interlocutors thereon.

1727. Capt. *William Stewart* dying without Iſſue; and as *James*, the fourth and youngeſt Son of old *John Stewart*, was then alſo dead without Iſſue, *Agnes Stewart*, the eldeſt Daughter of the ſaid *John Stewart*, took the Eſtate as Heir to her Brother *William*, upon the Footing of the Entail 1719, and poſſeſſed the ſame till the Year 1732, when ſhe alſo died without Iſſue.

Upon the Death of *Agnes* the eldeſt Daughter, *John Coltrain* of *Drummorrall*, the Son of *Eliſabeth* the ſecond Daughter, was ſerved Heir of Tailzie to his Aunt *Agnes*, and continued to poſſeſs the Eſtate, during all the remaining Years of the Purſuer's Minority: And it is no Secret, what Attempts were made to prevail with the Purſuer, when ſhe came to be of Age, and was living in Family with him, to renounce her Pretenſions to this Eſtate, and to accept of a Proviſion in lieu thereof. So true it is, that the ſaid *John Coltrain* was in the full Knowledge

Knowledge of the Purſuer's Title to ſaid Eſtate, by virtue of the aforeſaid Marriage-contract 1668.

During the Lifetime of *Agnes* the eldeſt Siſter, and while ſhe was in Poſſeſſion of the Eſtate, as Heir of Tailzie under the Settlement 1719, *John Coltrain* of *Drummorrall*, the Son of the ſecond Siſter, who had then but a diſtant and uncertain Hope of Succeſſion, even in Terms of the Tailzie 1719, intermarried with Mrs *Chriſtian Herron*, third Daughter of Mr *Herron* of that Ilk; and, by the Marriage-articles, became bound and obliged to infeft and ſecure her, in caſe of his Predeceaſe, in a yearly Annuity of 600 Merks, to be uplifted and taken out of his paternal Eſtate of *Drummorrall*; and by an after Clauſe in the ſame Marriage-articles, "In caſe it ſhould happen, that "he the ſaid *John Coltrain* ſhould, at any Time during the "Exiſtence of ſaid Marriage, fall into, and ſucceed to the "Lands and Eſtate of *Phiſgill*, then, and in that Caſe, he "bound and obliged himſelf, and his foreſaids, to diſburden "and free his ſaid Lands and Eſtate of *Drummorrall* of the ſaid "yearly Annuity provided to the ſaid Mrs *Chriſtian Herron*, in "Manner above mentioned; and to infeft and ſecure her in a "yearly Annuity of 900 Merks *Scots*, in caſe there be Chil-"dren of ſaid Marriage; and in a yearly Annuity of 1200 "Merks, in caſe there be no Children, to be uplifted and ta-"ken forth of the ſaid Lands and Eſtate of *Phiſgill*." 1728.

And by Deed, of this Date, the ſaid *John Coltrain*, upon a Recital of the above-mentioned Marriage-articles between him and the ſaid Mrs *Chriſtian Herron*; and ſubſuming, that he had then ſucceeded to the Lands and Eſtate of *Phiſgill*, and that he was reſolved to ſettle and provide his ſaid Spouſe in an additional Jointure and Liferent-proviſion, *viz.* 1200 Merks in caſe of Children, and 1500 Merks in caſe of no Children; therefore, and for Love, Favour, and Affection to her, he provides and ſecures to her, in caſe of her Survivance, an yearly Liferent-proviſion, of the full fourth Part of the free Rent of the Lands and Barony of *Phiſgill*; and for Security thereof, to infeft and ſeiſe her in ſaid Lands and Eſtate: And he 1734.

thereby further provides her to an yearly Liferent of 500 Merks, to be uplifted forth of his paternal Eſtate of *Drummorrall*; at leaſt ſo much thereof, as, with the aforeſaid fourth Part of the free Rent of the Eſtate of *Phiſgill*, ſhould amount to the aforeſaid Annuity of 1200 Merks, in the Event of there being Children, and of 1500 Merks, if there ſhould be no Children. And, in terms of the Precept contained in this Bond of Liferent-proviſion, the ſaid Mrs *Chriſtian Herron* was accordingly infeft in the whole Lands and Eſtate of *Phiſgill*.

The Purſuer *Agnes* was thus kept ignorant of her Title to the Eſtate of *Phiſgill*, until ſhe attained the Years of Majority, when ſhe happened accidentally to diſcover that Duplicate of the Marriage-contract 1668, which had been left with her Grandmother's Friends, ſtill blank in the Witneſſes Names and Deſignations; and though all poſſible Inquiry was made after the other Duplicate, no Diſcovery could be thereof made, further than that it was in the Charter-cheſt of the Family when *John Coltrain* of *Drummorrall*, upon his Succeſſion, cauſed inventary the Papers therein contained, in the View of making up his own Titles to ſaid Eſtate.

And therefore it was, that, upon her Marriage with the other Purſuer *John Hathorn*, and in order to aſſert her Title to this Eſtate under the Settlement in her Grandfather and Grandmother's Marriage-contract, ſhe granted Bond to a Truſtee, who thereupon adjudged the Eſtate againſt her, as charged to enter Heir to her Grandfather; and upon that Title brought an Action of Reduction and Improbation againſt the ſaid *John Coltrain*, to ſet aſide the Tailzie 1719, as *contra fidem tabularum nuptialium*, and in fraud of her Right under that Marriage-ſettlement.

A ſeparate Proceſs was at the ſame time brought in Name of the Truſtee, for proving the Tenor of the aforeſaid Marriage-articles 1668; theſe, and every other Writing that might lead to a Diſcovery of the ſame, having been abſtracted and ſecreted: In which laſt-mentioned Proceſs an Act being pronounced, and firſt and ſecond Diligences granted, the complete Duplicate

of

of the Marriage-contract was diſcovered to be in the Hands of Mr *Herron* of that Ilk, the Father-in-law of the ſaid *John Coltrain* of *Drummorrall*; and as this Diſcovery ſuperſeded the Neceſſity of any further Procedure in the proving of the Tenor, the Reduction of the Tailzie 1719 came to be the only Subject of Diſpute.

And, upon Report of the Lord *Arniſton*, your Lordſhips, by Interlocutor of this Date, "found, That *John Stewart*, the "Maker of the Entail, could not ſettle the Eſtate provided in "the Contract of Marriage to the Heirs of the Marriage, ſo "as to prefer his own Daughter *Eliſabeth*, and her Iſſue, to "*Agnes Stewart*, the Heir of Line of the Marriage; and there-"fore ſuſtained the Reaſons of Reduction of the Deed of En-"tail." Jan. 5. 1743.

And by another Interlocutor, of this Date, upon adviſing a reclaiming Petition and Anſwers, "found, That the Eſtates "both of the Wife and Huſband, being provided by the Mar-"riage-contract 1668 to the Heirs of the Marriage, the ſaid "*John Stewart* had no Power to make the Deed of Entail "1719: That the ſame is *contra fidem tabularum nuptialium*, "and therefore reducible; reduced the ſame accordingly, ad-"hered to the former Interlocutor, and refuſed the Deſire of "the Petition." June 11. 1744.

And as theſe Interlocutors were affirmed upon an Appeal, the now Purſuers did, by virtue thereof, attain Poſſeſſion of ſaid Eſtate during the Lifetime of the ſaid *John Coltrain* himſelf.

After *John Coltrain*'s Death, Mrs *Chriſtian Herron* his Widow, under the Title of her Infeftment in the Eſtate of *Phiſgill*, for Security and Payment of the aforeſaid Liferent-annuity, brought an Action of Poinding of the Ground againſt the Tenants of that Eſtate, before the Sheriff of *Wigton*; which being thereafter advocated, was transformed into a Proceſs of Mails and Duties againſt the now Purſuers, as Proprietors of ſaid Eſtate, and their Tenants, for Payment to her of a fourth Part of the free Rents of ſaid Eſtate. 1745.

And from the Proceedings in that Proceſs, it appears that the whole

whole of the Argument pleaded on Behalf of the Widow in ſupport of her Claim to this Annuity, out of an Eſtate which was now ultimately found did not belong to her Huſband, and which he held under a Settlement in fraud of the now Purſuer's Right under the Marriage-articles 1668, reſolved in this, That ſhe was an onerous Purchaſer of the Proviſions in her Marriage-contract: That it was upon the Faith of the eventual Jointure provided to her out of the Eſtate of *Phiſgill*, that ſhe entered into ſaid Marriage; and that the after Deed in implement of the Marriage-articles, was executed when her Huſband was ſuppoſed to be in the Right of Fee and Property of ſaid Eſtate.

It was anſwered for the now Purſuers, That *John Coltrain* never had any true or juſt Title to the Eſtate of *Phiſgill*: That the Tailzie 1719 was now ultimately found to have been *contra fidem tabularum nuptialium*, in fraud of the Purſuer *Agnes* her Right of Succeſſion, and as ſuch was reduced: That, as a Conſequence thereof, every Right depending thereon behoved to fall: That, from the Proofs in that former Proceſs, it appears that the Marriage-articles 1668 had been purpoſely ſecreted, and every Document that could have inſtructed her Right, and the Exiſtence of that Marriage-contract, deſignedly abſtracted: That theſe Marriage-articles were at length recovered out of the Hands of Mr *Herron*, the Widow's Father, and who was a principal Party in the Marriage-contract between her and the ſaid *John Coltrain*: That *John Coltrain* himſelf had Poſſeſſion of the Charter-cheſt, and cauſed inventary the ſame, in order to make up his Titles to the Eſtate; at which Time the Marriage-articles 1668 were proved to have been in ſaid Charter-cheſt; and that he was further certiorated thereof by the Proceſs of Exhibition which had been raiſed in her Name, when an Infant, to which he was a Party: That, from the Contract of Marriage between her and the ſaid *John Coltrain*, it appeared, that ſhe relied, for her original Proviſion of 600 Merks, upon the Security thereby granted upon her Huſband's paternal Eſtate of *Drummorrall*; and that the transferring ſaid Proviſion from the Eſtate of *Drummorrall* to the Eſtate of *Phiſgill*, and the additional Proviſion

* Herron must have known that Drummorrall could not stand to the Estate of Phisgill unprejudice of the pursuer

viſion thereby granted to her, were but conditional, and only to take Effect in the Event of his ſucceeding to the Eſtate of *Phiſgill*; and therefore as he had never *de jure* ſucceeded to that Eſtate, ſhe could have no Claim to any Proviſion out of that Eſtate.

But, upon Report of the Lord Ordinary, your Lordſhips Feb. 7. 1749. were pleaſed, by Interlocutor of this Date, to find, "That the "Obligation entered into by *John Coltrain* of *Drummorrall*, in "the Marriage-ſettlement between him and Mrs *Chriſtian Herron*, whereby he was bound to ſettle upon her a Liferent-"proviſion to the Extent of *L.* 50 *Sterling* yearly, *was onerous* "*on the Part of the ſaid Mrs Chriſtian Herron*, and rational up-"on the Part of the ſaid *John Coltrain*; and that he having "implemented the ſame, by granting the Liferent-infeſtment "to that Extent, when he was in the Right of Fee and Pro-"perty of the Eſtate of *Phiſgill*, and his Right ſubject to no "Challenge from any Thing that did or could appear upon the "Records, that Infeſtment was juſt and onerous, and *does ſub-*"*ſiſt in her Perſon*, notwithſtanding of the Reduction after-"wards brought againſt the Right and Title of the ſaid *John* "*Coltrain*, upon the latent perſonal Obligation contained in "the Marriage-contract 1668, between *John Stewart* and *Ag-*"*nes Stewart* his Spouſe, whereby he was bound to ſettle the "Eſtate he ſhould acquire in favour of the Heirs whatſoever "of the Marriage; and notwithſtanding of the Decree ob-"tained in that Reduction, ſetting aſide the Right of the ſaid "*John Coltrain*, which the Lords found *could not hurt the ſaid* "*onerous Liferent-ſettlement* made to *Chriſtian Herron* the Pur-"ſuer by her ſaid Huſband, while he ſtood in the full Right of "Property of the Eſtate, conform to the Infeſtments and In-"veſtitures thereof."

And to this Interlocutor your Lordſhips adhered by another Interlocutor of this Date; both which were affirmed upon the Feb. 22. 1749. Appeal taken againſt the ſame.

And as the *ratio decidendi* expreſſed in the aforeſaid Interlocutors reſted upon the Widow's ſuppoſed *bona fide* onerous Pur-

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chaſe of the Proviſions in her Marriage-contract, and in the after Deed granted in her favour, by one who, from the Inveſtitures of the Eſtate, appeared to be in the Fee and Property thereof under the Tailzie 1719, which therefore could not be fruſtrated by the Marriage-articles 1668, which remained perſonal, and which, for any Thing that appeared, were unknown to the Lady, however evident it was that *John Coltrain* himſelf was in the full Knowledge thereof, and that the ſame had been induſtriouſly ſecreted, to prevent the now Purſuer from coming to the Knowledge of her Right; ſo, from the printed Caſes upon the Appeal, it appears that the only Ground inſiſted upon in ſupport of the Widow's Claim, was this ſuppoſed *bona fide* onerous Purchaſe.

The Reaſons offered upon her Part, in juſtification of your Lordſhips Interlocutors, as taken from her printed Caſe, were theſe following.

Reaſon 1. "Becauſe the ſaid *John Stewart* (i. e. *Coltrain*), at the Time "of making the ſaid Liferent-proviſion to the Reſpondent, was "in full Poſſeſſion of ſaid Eſtate, and had the Property there- "of legally and completely veſted in him: So that, in point of "Law, nothing can be clearer, than that, notwithſtanding any "previous latent Obligation, he might have ſold the Eſtate to "a Purchaſer for a *valuable Conſideration*, and would have for- "feited the ſame, in caſe he had been guilty of any Act incur- "ring a Forfeiture.

—— 2. "For that the Reſpondent was a Purchaſer of ſaid Liferent- "proviſion for a full and valuable Conſideration, without No- "tice of the ſaid Contract of 1668.

—— 3. "For that, notwithſtanding the Entail was reduced by the "Decree 1743, by reaſon of the perſonal Contract of 1668; "yet the ſame cannot affect the Right of a Purchaſer not ha- "ving notice of ſaid Contract of 1668, who claims under a "Deed executed by the ſaid *John Stewart (i. e. Coltrain)*, "whilſt he was in the undiſturbed Poſſeſſion of ſaid Eſtate, "under a Title then unimpeached, and which appeared, from "all the Entries upon Record, to be liable to no Objection:

"And

" And Property would be extremely precarious, if Purchaſers, " claiming under ſuch as have an apparent clear legal Title, " ſhould be affected by latent perſonal Obligations, of which " they could have no Notice."

Under the Authority of theſe Judgments, the Widow continues in Poſſeſſion of the aforeſaid Liferent-annuity of *L.* 50 *Sterling* yearly out of the Eſtate of *Phiſgill*, and muſt enjoy the ſame ſo long as ſhe lives.

But as *John Coltrain*, the Granter of that Proviſion out of an Eſtate to which he is found to have had no juſt Title, left a ſeparate Eſtate of his own, deſcendible to his Heirs at Law, and which he was ſo provident as to diſburden even of the original Liferent-proviſion of 600 Merks, to which it was ſubjected by the aforeſaid Marriage-contract between him and the ſaid Mrs *Chriſtian Herron*, and to transfer that original Proviſion, with the additional Proviſion of 300 Merks, to the Eſtate of *Phiſgill*; the Purſuers have brought their Action againſt *John Coltrain*'s Repreſentatives, to free, relieve, and diſburden them, and their Eſtate of *Phiſgill*, of the aforeſaid Liferent-annuity. And it is the Debate upon this Claim of Relief which the Lord Ordinary is now to report.

The Foundation of this Claim to vulgar Eyes, and at firſt View, would appear to be extremely obvious and clear. By the Marriage-articles 1668, which were moſt onerous on the Part of the Wife, her own Fortune, which makes the Bulk of the Eſtate, and any Lands which her Huſband might acquire, were provided to the Heir of the Marriage. The Purſuer *Agnes* was the undiſputed Heir of that Marriage, and has now ultimately prevailed in aſſerting her Right thereto. By the Tailzie 1719, which is found to have been *contra fidem tabularum nuptialium*, and in Fraud of her Right, ſhe was not only poſtponed to the whole other Iſſue, male and female, deſcended of her Grandfather's Body; but was diſinherited, and though but an Infant, incapable of giving Offence, was for ever excluded. And therefore, as *John Coltrain*, who had no other Title to this Eſtate but the aforeſaid fraudulent Deed of Tailzie 1719, charged

ged the ſame with this Incumbrance of a Liferent-annuity in favour of his Wife, ſo as even to relieve his own Eſtate, in the Event of his Succeſſion to the Eſtate of *Phiſgill*, of the original Proviſion of 600 Merks impoſed upon his paternal Eſtate of *Drummorrall*; however available that Incumbrance may be to his Widow, as a ſuppoſed *bona fide* onerous Purchaſer, he is bound, by all the Rules of Law and Juſtice, to relieve that Eſtate of the Incumbrance ſo impoſed: And that Obligation muſt transfer againſt his Repreſentatives, ſo as to intitle the Purſuers to have Acceſs againſt his proper Eſtate alongſt with his other Creditors; which, from the Circumſtances of that Eſtate, and the other Incumbrances affecting the ſame, there is Reaſon to apprehend, will afford but a very partial Relief. So that, in all Events, the Purſuers will be conſiderable Sufferers. But whatever the Conſequences ſhall be, the Queſtion at Iſſue before your Lordſhips is, Whether this Claim of Relief does lie or not?

The Defences which have been pleaded in bar of this Claim, are extremely ingenious and ſubtile, and which, if rightly underſtood, may be thus abridged: That the Fee of the Eſtate under the Deed of Tailzie 1719 was fully veſted in the Perſon of *John Coltrain*, though ſubject to Challenge, and afterwards reduced upon the perſonal Obligation in the Marriage-contract 1668: That being the *verus dominus*, the Eſtate was ſubject to his onerous Debts and Deeds: That the Widow's Liferent-proviſion became an effectual Charge upon ſaid Eſtate by Force of the Law, and her Huſband's *bona fide* Poſſeſſion: And though the Defenders were pleaſed to admit, as in the Minutes of Debate before the Lord Ordinary, that if *John Coltrain* had granted an Infeftment upon this Eſtate in ſecurity of borrowed Money, though the Creditor would have been ſecure, the Purſuers would have had good Action againſt *John Coltrain*, and his proper Eſtate, to relieve the Eſtate of *Phiſgill* of ſuch Incumbrance, becauſe in ſo far *John Coltrain* would have profited in his private Eſtate and Patrimony; it was contended, that this would not apply to the preſent Caſe, where the Liferent-proviſion

ſion granted by *John Coltrain* to his Spouſe, was in the View of his Succeſſion to the Eſtate of *Phiſgill*; to which he accordingly ſucceeded in a few Years thereafter: That this was but a ſuitable Proviſion, upon the Suppoſal of his having Right by Succeſſion to the Eſtate of *Phiſgill*, but was by no means ſuitable to the Eſtate of *Drummorrall*; and therefore that *John Coltrain* could not be ſaid to be profited in his own private Eſtate and Patrimony, when, in the View of his ſucceeding to the Eſtate of *Phiſgill*, he granted to his Wife a Liferent-proviſion ſo much beyond what would have been ſuitable to, or could have been demanded, out of his proper Eſtate of *Drummorrall*: That as this Liferent-proviſion was only granted conditionally, in caſe he ſhould ſucceed to the Eſtate of *Phiſgill*, no Action of Warrandice would have been competent againſt him at his Wife's Inſtance, in the Event of that Eſtate's being evicted; and upon the ſame Principle, that no Action of Relief can lie at the Purſuers Inſtance, as having now aſſerted their Title of Property to the Eſtate of *Phiſgill*: That if there had been no Marriage-contract between *John Coltrain* and his Wife, ſhe would have been intitled to a Terce out of the Eſtate of *Phiſgill*, and no Relief in that Caſe would have been competent to the now Purſuers; and as this Proviſion came in lieu of the Terce, to which by Law ſhe would have been intitled, the ſame Rule muſt obtain.

The Purſuers were adviſed, and did with ſome Reaſon imagine, that, under the Circumſtances of the Caſe as above ſtated, even in the Queſtion with the Widow herſelf, they had a probable Plea, in the Oppoſition they made to her Claim, for this Liferent-proviſion out of the Eſtate of *Phiſgill*, after they had prevailed in having it found and declared, that that Eſtate of Right belonged to them; and that the Tailzie 1719 was *contra fidem tabularum nuptialium*, and in fraud of the Purſuer *Agnes* her Right of Succeſſion under the Marriage-ſettlement 1668. And had the Queſtion been with *John Coltrain* himſelf, they cannot yet apprehend it could have admitted of a Doubt;

not to mention the clear Evidence of his Knowledge of that Marriage-contract, both from the Proceſs of Exhibition in 1716, and that the Contract itſelf was in the Charter-cheſt of the Family when he got Poſſeſſion thereof, and cauſed inventory the ſame: So that it muſt have paſſed from him to his Father-in-law Mr *Herron*, in whoſe Cuſtody it lay concealed from the Purſuer, when ſhe was obliged to undertake the proving of the Tenor.

But as the Widow reſted her Claim upon her ſuppoſed *bona fide* onerous Purchaſe, when ſhe entered into this Marriage-contract with the ſaid *John Coltrain*, in the View of his Right of Succeſſion to the Eſtate of *Phiſgill* under the Tailzie 1719, and which Proviſion was afterwards ſecured to her when he had got Poſſeſſion of that Eſtate, which therefore could not be defeated by the perſonal Contract 1668; and as it was upon that ſingle Ground that the Widow's Claim was ſuſtained, both by your Lordſhips, and in the laſt Reſort; no Argument can from thence ariſe in bar of the Purſuers Claim of Relief againſt the proper Eſtate of *John Coltrain*; as indeed the whole Diſpute with the Widow would have been idle and vain, upon Suppoſition that *John Coltrain* himſelf would not have been liable to relieve the Eſtate of *Phiſgill* of that, and every other Incumbrance wherewith he had charged it.

The Defenders admit, that if *John Coltrain* had profited in his own private Fortune and Eſtate by any Incumbrance charged upon the Eſtate of *Phiſgill*, the Action of Relief would have been ſo far undeniably relevant, becauſe he was in ſo far *lucratus*; as, for Example, if he had granted an Infeftment upon the Eſtate of *Phiſgill* in ſecurity of borrowed Money. But they are pleaſed to ſay, that that does not apply to the Caſe in hand; for that this Liferent-proviſion was granted in the View of his Right of ſucceeding to the Eſtate of *Phiſgill* under the Tailzie 1719, and was a ſuitable Proviſion out of that Eſtate, but unſuitable to the Eſtate of *Drummorrall*; and therefore that *John Coltrain* was not thereby *lucratus*.

But

But the whole of this Argument fails with reſpect to the original Proviſion of 600 Merks, and only applies to the additional Proviſion of 300 Merks, conditioned to take Effect in the Event only of his ſucceeding to the Eſtate of *Phiſgill*. And though this Diſtinction was taken notice of, and particularly inſiſted upon in the Minutes of Debate before the Lord Ordinary, no Anſwer was thereto attempted; for this good Reaſon, that it can admit of none.

And in order to explain what is thereby intended, your Lordſhips will obſerve, from the above State of the Caſe, that the Marriage-contract between the ſaid *John Coltrain* and Mrs *Chriſtian Herron*, was formed in a double View. *1ſt*, With reſpect to *John Coltrain*'s Circumſtances at that Time, and the Eſtate he ſtood then poſſeſſed of. *2dly*, With regard to the poſſible Contingency of his after Succeſſion to the Eſtate of *Phiſgill*, under the Tailzie 1719.

In the firſt of theſe Views, *John Coltrain* became bound and obliged, in all Events, to infeft and ſecure his ſaid Spouſe in an yearly Annuity of 600 Merks, forth of his Eſtate of *Drummorrall*; and this Proviſion muſt have been principally relied upon; as the Proſpect of his Succeſſion to the Eſtate of *Phiſgill*, even under the Tailzie 1719, was at beſt uncertain, as depending upon his ſurviving his Aunt *Agnes*, and her dying without Iſſue.

But as *Agnes* was then unmarried, ſo that there was probable Ground to hope, that the Eſtate of *Phiſgill* would devolve to him, the Son of the ſecond Daughter, by virtue of the Settlement in the Tailzie 1719; ſo, upon that Contingency, it was provided, by an after Clauſe in the Marriage-contract, and *John Coltrain* became thereby bound and obliged, in that Event, to diſburden the Eſtate of *Drummorrall* of the aforeſaid Annuity of 600 Merks, and to transfer the ſame upon the Eſtate of *Phiſgill*, with 300 Merks of additional Annuity out of ſaid Eſtate, in caſe there ſhould be Children of the Marriage, and 1200 Merks in caſe of no Children.

And

And ſuch being the Caſe, it is plain, according to the Defenders own Argument, that, *quoad* the original Proviſion of 600 Merks, ſecured upon the Eſtate of *Drummorrall*, *John Coltrain*, by transferring the ſame to the Eſtate of *Phiſgill*, was in ſo far profited in his own private Eſtate; and therefore was bound, *ex conceſſis* of the Defenders, to relieve the Eſtate of *Phiſgill* thereof. Six hundred Merks was agreed to be a ſuitable Proviſion for the Lady, out of the Eſtate of *Drummorrall*: So that, thus far at leaſt, it does not occur, what Argument there can be, either in Law or Juſtice, againſt the Relief now claimed.

And the Device fallen upon, of transferring this Annuity of 600 Merks from the Eſtate of *Drummorrall* to the Eſtate of *Phiſgill*, is real Evidence, if more were neceſſary, of *John Coltrain*'s Conſciouſneſs of the Defect of his Right to the Eſtate of *Phiſgill*, and of the Purſuer's preferable Title thereto, by the Marriage-ſettlement 1668; becauſe, upon Suppoſition of both Eſtates being his, there could be no Cauſe for transferring the 600 Merks from the one Eſtate to the other.

But the Purſuers ſubmit it to your Lordſhips, that they are equally well founded in their Claim for a total Relief. The Favour of the Law to onerous Purchaſers is, in many Caſes, extremely great, and no leſs juſt. But that the Party who has charged an Eſtate, which did not of Right belong to him, but was the Property of a third Perſon, ſhould be intitled to the like Favour, in order to keep his proper Eſtate *indemnis*, ſurpaſſes all Comprehenſion, and is contrary to the moſt eſtabliſhed Principles of the Law of *Scotland*, in many parallel Caſes.

A Father, who, by his Marriage-contract, provides an Eſtate to the Iſſue of that Marriage, remains Fiar, and the Heir of the Marriage is Creditor only in the Hope of Succeſſion, ſubject to all the Father's onerous Debts and Deeds: And therefore, every Security granted to Creditors, or onerous Purchaſers, ſtands good to them, preferably to the Heir of the Marriage. But if the Father has a ſeparate Eſtate, the Heir of the Marriage is intitled to Relief.

And,

And, upon the ſame Principle, Purchaſers or Creditors who contract with an Heir of Entail, neglecting any of the Punctilios preſcribed by the Statute 1685, are ſecure. The Eſtate is ſubjected to their Claims, as the Eſtate of *Phiſgill* is, in this Caſe, to the Widow's Liferent: But the next Heir of Entail has Action of Relief againſt the other Repreſentatives of that Heir, who charged the tailzied Lands with his proper Contractions.

And where that is the Caſe, the Purſuers will be pardoned to ſay, they do not comprehend what the Defenders mean by ſaying, that the Widow's Liferent became effectual by the Force of Law. No Claim can be effectual in any Caſe which the Law does not ſupport. *John Coltrain*'s Infeftment enabled him to grant that Proviſion, and to render it an effectual Incumbrance, though his Title to the Eſtate was faulty, and liable to Challenge; and the *bona fide* onerous Purchaſe of the Wife protected her againſt the Effect of that Challenge. But what Objection that ſhould furniſh to *John Coltrain* himſelf, or his ſeparate Eſtate, from relieving the Eſtate of *Phiſgill* of that Incumbrance, is truly inconceivable.

Neither does it concern the Purſuers, whether, upon the Eviction of the Eſtate of *Phiſgill*, the Widow would have had Recourſe upon the Warrandice againſt the Eſtate of *Drummorrall*, in caſe her Liferent had not been found effectual againſt the Eſtate of *Phiſgill*. There are not now *termini habiles* for ſuch a Queſtion, as the Eſtate of *Phiſgill* is found ſubject to this Liferent-proviſion.

Though, if that Point was to be argued, the Purſuers are adviſed, that as to the 600 Merks of original Proviſion conſtituted upon the Eſtate of *Drummorrall*, and which was only to be transferred to the Eſtate of *Phiſgill*, in the Event of *John Coltrain*'s ſucceeding thereto, it could not admit of a Queſtion, but that the Widow, upon the Eviction of the Eſtate of *Phiſgill*, and her Liferent-proviſion not being effectual againſt the ſame, ſhe muſt have been intitled to recur to her original Proviſion upon the Eſtate of *Drummorrall*.

And even as to the additional Proviſion of 300 Merks, as the Liferent-infeftment granted to her in the 1734, contained no reſolutive Condition, in caſe of the Eviction of the Eſtate of *Phiſgill*; the Purſuers muſt ſubmit it to your Lordſhips, whether, in the Caſe put, of the after Eviction of the Eſtate of *Phiſgill*, and the Relict's Infeftment not being found an effectual Incumbrance upon the ſame, ſhe would not have been intitled to recur againſt any ſeparate Eſtate belonging to her Huſband, upon the Clauſe of Warrandice in that Liferent-proviſion? Becauſe, however the original Obligation to grant that additional Proviſion, might appear to be conditional; yet as the Security granted in 1734 was ſimple and abſolute, the Widow's Claim to that additional Proviſion was no longer fettered by the aforeſaid Condition.

And whereas the Defenders have taken the Liberty to aſſume it as an undiſputed Point, that the Widow would have been intitled to a Terce out of the Eſtate of *Phiſgill*, in caſe no conventional Proviſion had been made for her; and that as this Claim would not have been competent for relieving the Eſtate of *Phiſgill* of the Terce, it can as little be ſuſtained for Relief of this Proviſion. The Purſuers, with all due Deference, can neither agree to the Principle, nor to the Conſequence. They are adviſed, in point of Law, that *John Coltrain*'s erroneous Infeftment, in conſequence of the Tailzie 1719, found to be a fraudulent Deed, and as ſuch liable to Challenge at the Inſtance of the Purſuer, the right Heir of that Eſtate, could not have intitled his Relict to a Terce; and that, ſuppoſing the Law could have ſupported her in that Claim, the ſame Relief would have been competent againſt *John Coltrain* himſelf, and every other Eſtate pertaining to him, as it was in his Right only that his Widow could be intitled to a Terce out of that Eſtate.

In reſpect whereof, &c.

ALEX. LOCKHART.

N. B. Capt.

N. B. Capt. *Stewart*'s paternal Eſtate ſold by his Truſtees ſince his Death, amounted to upwards of *L.* 2700 *Sterling*, beſides a Plough-gang of Land ſold to the Earl of *Galloway*, a little before his Death, for 4 or *L.* 500 *Sterling*; and likewiſe he ſold ſeveral Houſes in and Acres about the Town of *Wigton*; and there were alſo conſiderable Sums of Money due to him by ſeverals, and particularly by Mr *Herron* of *Herron*; as appears by a Proceſs now depending before your Lordſhips.

Notwithſtanding old *Phiſgill*, the Maker of the Tailzie, (in virtue whereof Capt. *Stewart* poſſeſſed the Eſtate fourteen or fifteen Years), was owing ſeveral Debts which were conſtituted by his Bonds, and that the Captain received *L.* 500 *Sterling* of Portion with his Wife, Mrs *Chriſtian Herron*; yet he did not apply one Shilling thereof to pay the Tailzier's Debts; ſo that the Purſuers have been obliged to pay the ſame, both Principal and Intereſt, ſince they got Poſſeſſion of the Eſtate.

Capt. *Stewart* was amongſt the oldeſt Lieutenants (if not the oldeſt) in an old Regiment when he married, conſequently had almoſt a Certainty of getting a Company, (which accordingly he did); which intitled his Widow to *L.* 25 *per annum*, which ſhe preſently receives from the Government.